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IN THE

Supreme Court of the State of Delaware

SHAHEED MATTHEWS, Defendant Below, Appellant, v. STATE OF DELAWARE, Appellee.	**No. 24, 2023** COURT BELOW: SUPERIOR COURT OF THE STATE OF DELAWARE, Cr. ID No. 1806004163 (N)

AMICUS CURIAE'S REPLY BRIEF

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PRELIMINARY STATEMENT

As set forth in amicus's opening brief, trial counsel's failure to move to suppress evidence seized from Mr. Matthews' cellphone under an unconstitutional general warrant was ineffective assistance of counsel. The State argues that the unconstitutional warrant is irrelevant because Mr. Matthews supposedly consented to a search of his cellphone before the detective announced that he had a warrant. But the State's argument depends on an ungrammatical reading of Mr. Matthews' statement "You can, you can have it." The pronoun "it" in Mr. Matthews' response referred to the detective's immediately preceding comment about Mr. Matthews' hesitance to provide his "cellphone number"—*not* to a search of the cellphone's contents. And even if the exchange is somehow deemed ambiguous, case law resolves ambiguity against a waiver of constitutional rights.

As for the seized cellphone evidence's prejudice to Mr. Matthews' defense, the State fails to engage with amicus's opening brief. For example, amicus's opening brief showed that both the State and the trial court acknowledged during trial that the cellphone evidence was "material", "probative" and "prejudicial." The State's answering brief does not even try to respond. Amicus's opening brief also highlighted the State's exaggeration of the video evidence on direct appeal. Opening Br. 8-9 n.3. Again, the State's answering brief does not even try to respond. The prejudice to Mr. Matthews' defense is evident.

ARGUMENT

I. TRIAL COUNSEL'S FAILURE TO MOVE TO SUPPRESS THE CELLPHONE EVIDENCE WAS INEFFECTIVE ASSISTANCE.

While asserting that a denial of postconviction relief is generally reviewed for abuse of discretion, the State does not dispute that this Court reviews "legal or constitutional questions, including ineffective assistance of counsel claims, *de novo*." Ans. Br. 5 (citing *Purnell v. State*, 254 A.3d 1053, 1093-94 (Del. 2021); *Reed v. State*, 258 A.3d 807, 821 (Del. 2021)). Nor does the State's answering brief meaningfully engage with amicus's account of the trial record. These items are undisputed, crystallizing the legal issues for *de novo* review.

A. Under *Bumper*, Mr. Matthews did not consent.

As set forth in amicus's opening brief, the State cannot meet its burden to establish that consent was voluntarily given "by showing no more than acquiescence to a claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968). Where the official conducting the search has first asserted that they possess a warrant, "there can be no consent." *Id.* at 548.

The State concedes that whether Mr. Matthews provided valid consent to the State's search of his cellphone "turns on the interpretation of a brief exchange in Matthews' December 28, 2017 recorded police interview." Ans. Br. 7. For multiple reasons, the recorded exchange establishes that Mr. Matthews did not provide valid consent.

i. *First*, the plain language of the recorded exchange shows that Mr. Matthews' purported consent only expressed willingness to provide his cellphone *number* — not consent to search of his cellphone's contents.

As the State concedes, "[t]he scope of a consent is determined by the language used in giving the consent." Ans. Br. 10 (citing *Guy v. State*, 913 A.2d 558, 563 (Del. 2006) (citing *Ledda v. State*, 564 A.2d 1125, 1129 (Del. 1989))). Mr. Matthews' statement on which the State relies is: "You can, you can have it." Ans. Br. 8 (citing AA349).

> DT1: … Well, listen, here's one thing I want to go over with you, okay? So everybody that we've talked to, okay, uh, I know you're kind of like funny about your cellphone, and you don't want to give me the **cellphone number**.
>
> SM: You can, you can have **it** (UI)

AA349 (emphasis added). It was only after this point — and after the detective announced that he had a warrant — that Mr. Matthews and the detective discussed searching the cellphone itself. *Id.*

The language of the purported consent — as a matter of grammar — was not consent to a search of Mr. Matthews' cellphone. That is because Mr. Matthews told the detective "you can have it."

"It" is a pronoun. "When a word such as a pronoun points back to an antecedent or some other referent, the true referent should generally be the closest

appropriate word ….” Bryan A. Garner, *Garner’s Modern American Usage* 540 (3d ed. 2009). *See also Daniel v. Hawkins*, 289 A.3d 631, 667 (Del. 2023) (applying “grammatical rule of pronoun-antecedent agreement” in interpreting proxy and citing Garner); *Genus Lifesciences, Inc. v. Azar*, 486 F. Supp. 3d 450, 460 (D.D.C. 2020) (“Under the ‘Last-Antecedent Canon,’ a ‘pronoun, relative pronoun, or demonstrative adjective generally refers to the nearest reasonable antecedent.’”); *In re Reuter*, 499 B.R. 655, 673 (Bankr. W.D. Mo. 2013) (applying “commonsense principle of grammar,” the “so-called ‘last antecedent canon’ … that a pronoun generally refers to the nearest reasonable antecedent”).

Here, the nearest reasonable antecedent of the pronoun “it” in Mr. Matthews’ response is the detective’s immediately preceding reference to Mr. Matthews’ “cellphone number”. As a matter of grammar, Mr. Matthews’ statement “you can have it” referred to providing his “cellphone number.” Opening Br. 4 (citing AA349). Mr. Matthews did not consent to a search of his cellphone before the detective announced that he had a warrant. Thus, this is indeed “a case where the police first announced they had a search warrant and the defendant merely acquiesced in a subsequent search.” Ans. Br. 2. Because the detective announced a warrant before obtaining any consent to search the cellphone, *Bumper* applies.

ii. *Second*, as set forth in amicus's opening brief, consent must be clear, and ambiguity is resolved against consent. Opening Br. 19-20 (citing authorities). The State's answering brief does not dispute this. As a result, even if the Court were to find Mr. Matthews' statement "[y]ou can have it" ambiguous — and it should not — that ambiguity would not be enough to establish consent to the cellphone search.

iii. *Third*, the State concedes that "[t]he State has the burden of proving that the consent was not coerced." Ans. Br. 10. The State cannot meet that burden.

Indeed, the cases cited by the State in which consent was found provide an important contrast. In multiple consent cases cited by the State, the defendant *signed* a standard consent *form* provided by the State. *See State v. Blackwood*, 2020 WL 975465, at *7 (Del. Super. Ct. Feb. 27, 2020) (cited at Ans. Br. 12) (finding defendant consented to search where signed consent form was "clear and unmistakable"); *Guy v. State*, 913 A.2d 558, 563-64 (Del. 2006) (cited at Ans. Br. 10) (finding consent where defendant signed written consent permitting police to search his apartment and giving defendant the right to revoke his consent); *Knight v. State*, 690 A.2d 929, 932 (Del. 1996) (cited at Ans. Br. 10) (finding consent where defendant signed consent form for search of cylinder); *Ledda v. State*, 564 A.2d 1125, 1129 (Del. 1989) (cited at Ans. Br. 10) (similar). What

occurred here is nothing like those cases. There is a strong policy interest in ensuring that consent to waive constitutional rights is clear.

iv. *Fourth*, the State argues that Mr. Matthews could have "withdraw[n] or limit[ed] his consent after learning that the police would 'dump' the entire contents of the cellphone." Ans. Br. 11. This argument fails for two reasons. First, Mr. Matthews did not consent to the search of his cellphone before the detective announced he had a warrant, so there was no consent to "withdraw or limit." Second, requiring a person to withdraw consent after being advised by law enforcement of a warrant makes no sense and cannot be reconciled with *Bumper*.

B. Mr. Matthews' defense was prejudiced.

The State further argues that even if he did not provide consent, Mr. Matthews was not prejudiced. Ans. Br. 13-14. The State's arguments on this score lack merit.

i. The State asserts that "[i]n light of [Mr. Matthews'] consent, a motion to suppress based on defects in the search warrant would have been futile" because Mr. Matthews "volunteered his phone to the officers and helped them access it, knowing they intended to download its entire contents." Ans. Br. 10 (quoting trial court decision on appeal). But the State's argument on this score is circular: It assumes that Mr. Matthews *did* provide valid consent to a cellphone search. But as set forth above and in amicus's opening brief, Mr. Matthews did not provide valid

consent. He only gave his cellphone to police officers after a law enforcement officer advised that he had a warrant. If the Court finds (as it should) that Mr. Matthews did not provide valid consent, then the State's "futility" argument necessarily fails because a properly framed motion to suppress would not have been futile at all.

ii. The State also quotes, without analysis, the trial court's statement that "the cell phone evidence had no bearing on the outcome of the case" because "[t]he video evidence, combined with Ms. Johnson's statements" was dispositive of Mr. Matthews' alleged guilt. Ans. Br. 13-14 (quoting *State v. Matthews*, 2023 WL 21545, at *9 (Del. Super. Ct. Jan. 3, 2023)). But as detailed in amicus's opening brief, this is rebutted by the trial record and even by both the State's and the trial court's own prior statements.

For example, during the trial below, the State "concede[d] and acknowledge[d] certainly this [cellphone] evidence is prejudicial …" AA174; *see also* AA176 (trial court stating "I think [the cellphone evidence has] got prejudice, and the State's acknowledged that."). The State's answering brief does not even mention these concessions, let alone engage with them.

Amicus's opening brief highlighted the weakness of the evidence at the trial level and the State's exaggeration on direct appeal of the video evidence. Opening Br. 8-9 n.3. The State's answering brief does not even try to respond to those

points. The State instead cites the trial decision on appeal as its grounds for arguing that there was no prejudice. Ans. Br. 13-14. But citing the decision being appealed while failing to engage with the arguments for why that decision erred is no basis for affirmance. Indeed, it misses the point of the appellate process.

CONCLUSION

For the foregoing reasons and the reasons set forth in amicus's opening brief, Mr. Matthews' conviction should be reversed and the case remanded for a new trial.

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